CRIMINAL APPEAL NO. 172 OF 2005- COURT OF APPEAL OF TANZANIA AT ARUSHA- RAMADHANI, C.J., MROSO, J.A. And KAJI, J.A.	**BAKARI HAMISI vs. REPUBLIC- Appeal from the conviction of the High Court of Tanzania at Arusha- HC. Criminal Appeal No. 3 of 2004- Rutakangwa, J.-**	offence of rape contrary to Sections 130 (2) and 131 of the Penal Code Cap. 16 as amended by the Sexual Offences Special Provisions Act No. 4 of 1998- Sentenced of thirty (30) years imprisonment, and an order to pay the complainant s. 100,000/= as compensation. Contents of PF3- Complainant medically examined by a medical officer of Babati Government Hospital- However, according to his observation in the PF3 it is not clear what he observed.- Medical Officer-filled his observation in columns 1,3,4 and 5 of the PF3 as follows: (1) Raped case (3) Genital area (4) Dangerous harm (5) Sexual intercourse. He concluded with a remark of "dangerous harm". Particulars/observation by Medical Officer in PF 3 were not sufficient to enable the

		Medical Officer to form an opinion that Complainant had been raped and PF3 could not have corroborated the act of rape. Cognisance of Section 127 (7) of the Evidence Act which was introduced by the Sexual Offences Special Provisions Act providing that a conviction may be founded on the evidence of the victim of the rape if the Court believes, for the reasons to be recorded, that the Victim witness is telling nothing but the truth. Record the prosecution evidence was recorded by H. H. M. Tuwa (DM). But the defence evidence and the judgment were recorded by M. H. M. Seenene (DM).-There is nothing in the record suggesting that Section 214 of the Criminal Procedure Act was explained to the appellant or that the appellant elected Tuwa's successor to

		proceed from where he had ended. This was an error. Appeal is allowed, the conviction quashed and sentence and the order for compensation is set aside.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., MROSO, J.A. And KAJI, J.A.)

CRIMINAL APPEAL NO. 172 OF 2005

BAKARI HAMISI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Arusha)

(Rutakangwa, J.)

dated the 3rd day of August, 2005
in
HC. Criminal Appeal No. 3 of 2004

JUDGMENT OF THE COURT

24 October & 30 November, 2007

KAJI, J.A.:

In the District Court of Babati in Criminal Case No. 226 of 2002, the appellant Bakari Hamisi was charged with and convicted of the offence of rape contrary to Sections 130 (2) and 131 of the Penal Code Cap. 16 as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment, and was ordered to pay the complainant Hafsa d/o Mwinyi Hamisi (PW2) Shs. 100,000/= as compensation. He was aggrieved. On first appeal his appeal was dismissed for want of merit.

The facts of the case as reflected in the record may briefly be stated as follows: -

On 30.8.02 at about 1 pm, while Hafsa d/o Mwinyi Hamisi (PW2) was on her way to Singe Secondary School, when she arrived at Manyara, she met the appellant armed with some stones. The appellant asked her as to her name to what she did not reply. He ordered her to undress her underwear to what she refused. Suddenly the appellant grabbed her, dragged her into a bush and raped her. While still at the scene PW2's younger Sister, Hamini d/o Mwinyi Hamisi (PW4) and one Ramadhani Issa who could not be traced for evidence, arrived. But the appellant ran away just when

they approached. The matter was reported to the police who issued PW2 with a PF3. PW2 was medically examined by a medical officer of Babati Government Hospital Fuatael Sossiya (PW3). However, according to his observation in the PF3 Exh P.1 it is not clear what he observed. He filled his observation in columns 1,3,4 and 5 of the PF3 as follows: - (1) Raped case (3) Genital area (4) Dangerous harm (5) Sexual intercourse. He concluded with a remark of "dangerous harm". The appellant was arrested and charged as above.

In his defence the appellant denied the allegation and raised a defence of *alibi* that at the material time he was at Nanyara Village loading and carrying bricks in a lorry to Babati Town. He called Bashiri Issa (DW2) and Seleman Shabani who said they were with him on the job from 9 am till 3 pm. The trial magistrate was not impressed. He convicted him and sentenced him as above. The appellant was dissatisfied. In his petition of appeal he preferred 4 grounds and later added two grounds making a total of six grounds. However at the hearing he abandoned grounds Nos. 1 and 4. He proceeded with four grounds which may conveniently be paraphrased as follows: -

One, that the prosecution did not prove his guilt beyond all reasonable doubt.

Two, that the PF3 did not show that PW2 was raped.

Three, that PW2 and PW4 were from the same family and that their evidence should have been considered carefully.

He did not wish to elaborate on them. He preferred the learned State Attorney to respond thereafter he would give his rejoinder. Responding to these grounds Mr. Henry Kitambwa, learned State Attorney who advocated for the respondent Republic submitted that the prosecution had proved the guilt of the appellant sufficiently through the evidence of PW2 who was the victim of the rape, PW3 who medically examined her and formed an opinion that there was sexual intercourse, and PW4 who saw the appellant running away from the scene. The learned State Attorney pointed out that a mere fact that PW4 was related to PW2 was immaterial as long as provided she told the truth. In his view, she told the truth because she knew the appellant and it was during daytime.

In a short but dynamic rejoinder the appellant complained why the doctor, PW3 was allowed to tender an exercise book on another day where he had recorded differently from the PF3. He held the

view that the observation in the exercise book was cooked up to implicate him. The appellant challenged his identification by PW2 on the ground that PW2 did not say how far she was when she alleged she saw him running away from the scene. The appellant held the view that the case was a frame up by PW2 who previously accused him for house breaking and stealing in Babati Criminal Case No. 91 of 2002 in which he was convicted but was acquitted on appeal.

On our part, we have carefully considered whether, or the evidence on record, the act of rape of PW2 was sufficiently proved, and if so whether it was the appellant who raped her.

According to the prosecution the evidence which proved that PW2 had been raped was that of PW2, PW3, the medical reports Exh P1 and P5. Exh P1 is the PF3, and Exh P5 is the exercise book. The evidence of PW3 and the PF3 Exh P1 were held by the trial Court (not Exh P5) to have corroborated PW2 that she was raped. We have carefully considered the contents of the PDF3 Exh P1 and the exercise book Exh P5 and the manner in which Exh P5 was tendered as exhibit. According to the contents of the PF3 as indicated above it is not clear what made PW3 form an opinion that there was sexual

intercourse. PW3 had simply recorded "raped case, genital area, dangerous harm, sexual intercourse". We ask ourselves: Were these particulars/observation sufficient to enable PW3 to form an opinion that PW2 had been raped? In our view we think they were not, and the trial Court erred in holding the PF3 Exh P1 to have corroborated the act of rape. As far as the exercise book Exh P5 is concerned it contains particulars which could corroborate the act of rape. For example one of the particulars indicates that some sperms were seen apparently in PW2's private part (vagina). But the appellant has complained that it was probably doctored to implicate him. We have given this complaint a serious consideration for the following reasons:-

First, there was a PF which is normally used in matters of this nature. We ask ourselves: why did the doctor (PW3) fail/omit to fill the PF3 with those observations and instead decided to record them in a school exercise book? There was no explanation given.

Second, why did it take so long for Exh P5 to be tendered by PW3? PW3 tendered the PF3 on 7.3.2003. But he tendered the exercise book Exh P5 on 25.8.2003, after a period of over five (5)

months. There was no explanation given. This strengthens the appellant's complaint that it was probably concocted to implicate him, especially bearing in mind the appellant's allegation that he was in bad blood with PW2. The trial Court was right in discarding Exh P5 and the judge on first appeal erred in relying on it in rejecting the appeal. The shortfalls in Exh P1 and P5 renders the evidence of the maker, PW3, of little value, if any. That being the position it is clear to us that there was no evidence which corroborated the act of rape of PW2.

We are aware that under Section 127 (7) of the Evidence Act which was introduced by the Sexual Offences Special Provisions Act a conviction may be founded on the evidence of the victim of the rape if the Court believes, for the reasons to be recorded, that the Victim witness is telling nothing but the truth. In the instant case the learned trial magistrate did not say specifically whether PW2 was truthful and the reason for saying so. Of course he would hardly record/say so because as we will soon demonstrate the magistrate who wrote the judgment was not the one who had recorded the evidence of the prosecution witness.

We now move to the issue of whether the appellant was properly identified especially by PW4 who did not mention how far she was from the suspect and how she saw and identified him in view of PW2's assertion that the scene of crime was in the bush. We think in the circumstances it was dangerous to hold that PW4 properly identified the rapist to be the appellant. Therefore the trial Court erred in holding that the evidence of PW2 that it was the appellant who raped her. This, however, is merely an academic exercise after our holding that there were doubts whether PW2 was raped.

Lastly, there is one issue although not raised as a ground of appeal yet we think it is worth if we address our mind on it. According to the record the prosecution evidence was recorded by H. H. M. Tuwa (DM). But the defence evidence and the judgment were recorded by M. H. M. Seenene (DM). There is nothing in the record suggesting that Section 214 of the Criminal Procedure Act was explained to the appellant or that the appellant elected Tuwa's successor to proceed from where he had ended. This was an error. But in view of the position we have taken in determining this appeal we think we do not have to say much on this.

Had the learned judge on first appeal taken the view we have taken she would have allowed the appeal.

For the reasons stated above, we allow the appeal, quash the conviction and set aside the sentence and the order for compensation. The appellant is to be released unless lawfully held.

DATED at ARUSHA this 8th day of November, 2007.

A. S. L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA

DEPUTY REGISTRAR

Delivered under my hand and Court Seal in Court/Chambers at ..... this ..... day of ..... 2007.

.....

DISTRICT REGISTRAR